



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2005

Mr. Larry M. Thompson
Assistant District Attorney
Tarrant County Hospital District Office
1025 South Jennings, Suite 300
Fort Worth, Texas 76104

OR2005-04418

Dear Mr. Thompson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224513.

The Tarrant County Hospital District (the "district") received a request for thirteen categories of information regarding health care services provided to Tarrant County inmates. You state that you will release most of the requested information, but you claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code and privileged under rules 502 and 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the district's obligations under section 552.301 of the Government Code. In accordance with section 552.301(b), a governmental body seeking a ruling from this office must assert the exceptions to disclosure that apply to the requested information no later than the tenth business day after receiving the written request. You state that the

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

district received the present request for information on March 3, 2005. You did not, however, raise sections 552.103 and 552.107 of the Government Code and rules 502 and 503 of the Texas Rules of Evidence until March 24, 2005. Consequently, you failed to comply with the ten-business-day deadline mandated in section 552.301(b) with respect to your claims under sections 552.103 and 552.107 and rules 502 and 503.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Sections 552.103 and 552.107 are discretionary exceptions that may be waived by a governmental body and therefore do not provide compelling reasons to overcome the presumption of openness under section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision 630 (1994) (governmental body may waive statutory predecessor to section 552.107). Additionally, this office has determined that discovery privileges, such as rules 502 and 503 of the Texas Rules of Evidence, do not constitute compelling reasons to overcome the presumption of openness under section 552.302. *See, e.g.*, Open Records Decision No. 676 at 11 (2002) (assertion of rule 503 does not demonstrate "compelling reason" under section 552.302 to prohibit governmental body's release of information). Therefore, none of the submitted information may be withheld from disclosure under section 552.103 or 552.107 of the Government Code, or rule 502 or 503 of the Texas Rules of Evidence.

We now turn to your remaining arguments against disclosure. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing

body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, a “‘medical committee’ includes any committee, including a joint committee, of . . . a hospital [or] a medical organization” Health & Safety Code § 161.031(a). The term “medical committee” also includes “a committee, including a joint committee, of one or more of the entities listed in Subsection (a).” *Id.* § 161.031(c). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital [or] medical organization . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services” Health & Safety Code § 161.0315(a).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other things, statutory predecessor to section 161.032).

You state that the e-mails in Exhibit E were submitted as part of the “Big Blue Button” reporting system to the district’s Quality Committee. You also state that the reports and charts in Exhibit H were prepared by an agent of the Quality Committee for evaluation and possible further investigation by the Quality Committee. You inform us that the Quality Committee assesses and improves the operations of the district and ensures the district’s compliance with federal and state statutes and regulations regarding the health care industry. Based on your representations, we find that the Quality Committee is a medical committee for purposes of subchapter D of chapter 161 of the Health and Safety Code. *See* Health & Safety Code § 161.031(c). Therefore, we find that Exhibits E and H are confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 241.152 of the Health and Safety Code, which states in relevant part:

(a) Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient’s legally authorized representative without the written authorization of the patient or the patient’s legally authorized representative.

Health & Safety Code § 241.152(a). Section 241.151(2) of the Health and Safety Code defines “health care information” as “information recorded in any form or medium that *identifies* a patient and relates to the history, diagnosis, treatment, or prognosis of a patient.” Health & Safety Code § 241.151(2) (emphasis added). You claim that the grievance forms in Exhibit I include health care information pertaining to inmates. You have not informed us that the district has received written authorization to release any health care information. Accordingly, we have marked the inmates’ identifying information that the district must withhold in Exhibit I under section 552.101 of the Government Code in conjunction with section 241.152(a) of the Health and Safety Code.

You contend that the information in Exhibit O is confidential under section 552.101 of the Government Code in conjunction with section 1301.91 of title 21 of the Code of Federal Regulations. You indicate that the information in Exhibit O pertains to a theft of controlled substances at one of the district’s infirmaries. You inform us that section 1301.76(b) of title 21 of the Code of Federal Regulations requires that the district notify the Field Division Office of the Drug Enforcement Administration in the event of the theft or significant loss of any controlled substance and complete a DEA-106 form regarding such theft or loss. *See* 21 C.F.R. § 1301.76(b). You assert that the DEA-106 form and supporting documentation in Exhibit O were completed pursuant to section 1301.76(b), and are therefore confidential pursuant to section 1301.91 of title 21 of the Code of Federal Regulations. Section 1301.91 provides in pertinent part:

Reports of drug diversion by fellow employees is not only a necessary part of an overall employee security program but also serves the public interest at large. It is, therefore, the position of DEA [Drug Enforcement Agency] that an employee who has knowledge of drug diversion from his employer by a fellow employee has an obligation to report such information to a responsible security official of the employer. The employer shall treat such information as confidential and shall take all reasonable steps to protect the confidentiality of the information and the identity of the employee furnishing information

21 C.F.R. § 1301.91. While we agree that section 1301.91 does provide for the confidentiality of information obtained from an employee who reports the theft of a controlled substance by another employee, you have not demonstrated, and it is not otherwise apparent to this office, how section 1301.91 applies to the information in Exhibit O, which documents a theft of controlled substances by an unknown perpetrator. You do not represent, and the documents themselves do not indicate, that a district employee reported that the theft may have involved another district employee. Therefore, you may not withhold any of the information in Exhibit O under section 552.101 of the Government Code in conjunction with section 1301.91 of title 21 of the Code of Federal Regulations.

You also contend that the privacy act provision printed on the DEA-106 form in Exhibit O prohibits the disclosure of this form, except to federal, state, and local law enforcement and

regulatory agencies for law enforcement and regulatory purposes. The provision cites to section 301 of the Controlled Substances Act of 1970 as statutory authority to prohibit such disclosure. We note that section 301 has been codified as section 821 of title 21 of the United States Code, which authorizes the United States Attorney General to promulgate rules and regulations regarding the manufacture, distribution, and dispensing of controlled substances. *See* 21 U.S.C. § 821. The confidentiality provision of section 1301.91 of title 21 of the Code of Federal Regulations was enacted pursuant to the authority granted to the United States Attorney General in section 821. *See* 21 C.F.R. § 1301.01. However, as noted earlier, the confidentiality provision of section 1301.91 does not apply in this instance. As you do not cite to any other statutory authority by which the DEA-106 form is confidential, and we are not otherwise aware of such a statute, we conclude that you may not withhold the DEA-106 form in Exhibit O pursuant to the privacy act provision at issue.

We note, however, that Exhibit O contains medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Therefore, the medical records we have marked in Exhibit O may only be released in accordance with the MPA.

We note that portions of Exhibits L and N are excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy. Information is protected from disclosure under common law privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of

information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information that is confidential under common law privacy and must be withheld under section 552.101 of the Government Code on that basis.

We also note that portions of Exhibits L, M, and N may be excepted from disclosure under section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was received. If the employees at issue timely elected to keep the information we have marked confidential, the district must withhold this information under section 552.117 of the Government Code. The district may not withhold the information marked under section 552.117 of the Government Code if the employees at issue did not make timely elections to keep the information confidential.

We further note that Exhibit N includes e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at

² This office will raise mandatory exceptions like sections 552.117 and 552.137 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any of the e-mail addresses at issue. Therefore, the district must withhold the e-mail addresses we have marked in Exhibit N under section 552.137 of the Government Code.

In summary, the district must withhold Exhibits E and H under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The district must withhold the information we have marked in Exhibit I under section 552.101 of the Government Code in conjunction with section 241.152(a) of the Health and Safety Code. The marked information in Exhibit O may only be released in accordance with the MPA. The marked information in Exhibits L and N must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. If the employees at issue made timely elections under section 552.024 of the Government Code to keep the information we have marked in Exhibits L, M, and N confidential, the district must withhold this information under section 552.117 of the Government Code. The district must withhold the marked e-mail addresses in Exhibit N under section 552.137 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/jev

Ref: ID# 224513

Enc. Submitted documents

c: Ms. Jennifer Autrey
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